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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. [REDACTED]

GENERAL ATOMIC COMPANY,
Petitioner,
v.

THE HONORABLE EDWIN L. FELTER, JUDGE,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW MEXICO**

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The petitioner, General Atomic Company ("GAC"), respectfully supplements its petitions for writs of certiorari and mandamus filed March 3, 1978, and prays that a writ of certiorari issue to review (a) the order of the Supreme Court of New Mexico entered at approximately 1:30 p.m. on March 2, 1978, denying petitioner's application for Original Mandamus and Prohibition, and (b) the entry of the resulting Sanctions Order and Default Judgment, filed at approximately 2:00 p.m. on the same day by the District Court for the First Judicial District of Santa Fe County, New Mexico (Hon. Edwin L. Felter).

OPINIONS BELOW

The order of the Supreme Court of New Mexico issued on March 2, 1978, is not reported, but is reproduced in the

accompanying Appendix A at 1a. The Sanctions Order and Default Judgment entered one-half hour thereafter by the Hon. Edwin L. Felter is not reported, but is reproduced in the accompanying Appendix B at 2a.

JURISDICTION

The decision of the Supreme Court of New Mexico on petitioner's application for Original Mandamus and Prohibition was entered on March 2, 1978. Jurisdiction of this Court to review that order rests upon 28 U.S.C. § 1257(3). *See, e.g., Madruga v. Superior Court*, 346 U.S. 556 (1954); *Fisher v. District Court*, 424 U.S. 382 (1976). In the unusual circumstances presented here, jurisdiction of this Court to review the final aspects of the order of the District Court for the First Judicial District of Santa Fe County¹ entered on March 2, 1978, immediately following and pursuant to the ruling of the New Mexico Supreme Court, rests upon 28 U.S.C. § 1651 (common-law writ of certiorari) as well as upon 28 U.S.C. § 1257, as hereinafter appears.

QUESTION PRESENTED

Whether the New Mexico Supreme Court should have prohibited a trial judge, who had unconstitutionally precluded petitioner for over twenty months from litigating disputed issues in federal arbitration proceedings and

¹ The District Court's Order of March 2 implements Judge Felter's prior rulings that information and documents located in Canada in the possession of a non-party Canadian corporation must be identified, disclosed and produced, and his unlawful preclusion of the right of GAC to seek federal arbitration. These are matters which are independent of, anterior to and separate from the merits of this case, and are therefore final within the meaning of the jurisdictional statutes. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). As pointed out, *infra*, at 11, there is no intention here to seek review of errors which must first be reviewed in the New Mexico appellate courts.

federal courts, from rushing a case to judgment by precipitously terminating a trial and, without any evidentiary hearing, entering against petitioner a default judgment which contained enormously consequential findings of fact and was based upon petitioner's inability, because of Canadian criminal law, to secure identification, production, or disclosure of documents and information located in Canada in the possession of a non-party Canadian corporation.

STATUTES INVOLVED

The Atomic Control Act of Canada, Can. Rev. Stat. ch. A-19 (1970), is set forth in the accompanying Appendix O at 76a.

The Canadian Uranium Information Securities Regulations, Stat. O.&R. 76-644 (P.C. 1976-2368), is set forth in the accompanying Appendix P at 86a.

The Ontario Business Records Protection Act, Ont. Rev. Stat., ch. 54 §§ 1-3 (1950), is set forth in the accompanying Appendix Q at 87a.

Section 37 of the New Mexico Rules of Civil Procedure, N.M. Civ. R. 37, is set forth in its entirety in the accompanying Appendix S at 90a.

STATEMENT

1. Introduction

This petition is a companion to *General Atomic Co. v. Felter*, No. 77-1236, and *General Atomic Co. v. Felter*, No. 77-1237. It is being filed to bring before this Court, for its remedial action, the latest in a series of rulings, issued by the courts of New Mexico, which individually and collectively amount of a massive denial of rights guaranteed by the Constitution and by accepted standards of fairness in adjudication. The orders which are the subject of this petition were issued on March 2, 1978,

when the printer's proofs for the petitions previously filed were in their final stages. The orders of March 2 were, accordingly, discussed in petitioner's application for stay, filed on March 3 and now pending before the full Court as No. A-747 Misc.; but they were not incorporated in the printed petitions filed on that date, except for a brief reference at p. 7, n.11 of the Petition for Certiorari. For reasons set out herein, we believe that review of the latest actions of the New Mexico courts is within the jurisdiction of this Court, and that such actions demonstrate, beyond any shadow of doubt, that petitioner—the defendant in the most sizable litigation ever to come before the courts of New Mexico—is the victim of a major and continuous denial of minimal standards of justice and fairness.

2. The Order of the New Mexico Supreme Court Issued on February 1, 1978

GAC's pending petition for certiorari relates to a purported "discovery order," accompanied by the threat of drastic sanctions, issued by Judge Felter on November 18, 1977. *See Petition for Certiorari, No. 77-1236, p. 8.* On January 11, 1978, the New Mexico Supreme Court refused to issue a writ of prohibition to vacate or modify the order. On February 1, 1978, GAC again appeared before the New Mexico Supreme Court, asking it to stay the November 18 order pending the filing and disposition of papers in this Court. GAC pointed out to the New Mexico Supreme Court that the entry of any further order carrying out the drastic sanctions threatened in Judge Felter's ruling of November 18 could have serious and irreparable consequences. At least one member of the New Mexico Supreme Court apparently recognized the validity of this contention. In Appendix N to GAC's pending petition (No. 77-1236, pp. 49a-50a), we have reproduced the exchange during oral argument in which Justice Easley of the New Mexico Supreme Court sug-

gested that the trial judge's proposed findings be made available to counsel, and that review of these findings, in their proposed state, be had in the New Mexico Supreme Court before their formal entry.² Consistently with this suggestion, a February 1, 1978 order of the Supreme Court of New Mexico, denying a stay pending filings in this Court, contained a proviso which directed Judge Felter "to allow the parties sufficient time prior to the entry of any order or findings of facts . . . to present to this Court additional motions as may be appropriate."³ Such preliminary review by the New Mexico Supreme Court would, at the very least, have afforded an opportunity for that tribunal (and, possibly, this Court) to determine whether Judge Felter's implementation of his "discovery order" would exceed his constitutional and jurisdictional bounds.

3. Judge Felter's Reaction to the New Mexico Supreme Court Order

On February 16, 1978, Judge Felter advised the parties, in a formal "Notice," that "[o]n or after March 1, 1978, the Court, in the exercise of its discretion and judgment, will enter such orders, findings, sanctions or judgments . . . as to the Court then appears to be just and lawful." See Appendix O to Petition for Certiorari, No. 76-1236, pp. 51a-52a. No proposed findings were disclosed in the "Notice" of February 16. Instead, Judge Felter merely told GAC that it had until February 28 to file papers in the New Mexico Supreme Court to forestall findings which were wholly unknown.

² This same exchange appears as Appendix C to this petition, at 27a.

³ The full order is reproduced in accompanying Appendix D at 29a, and as Appendix M to GAC's petition No. 77-1236 (pp. 47a-48a).

4. The New Mexico Supreme Court Capitulates

This apparent violation of the earlier order of the New Mexico Supreme Court was the subject of a motion, filed by GAC on February 20, 1978, renewing its application for a writ of mandamus or prohibition. GAC contended that it was entitled to a hearing on proposed findings and sanctions before any were entered.⁴ After hearing oral argument on March 1, 1978, the New Mexico Supreme Court took the matter under advisement. On March 2, 1978, it issued an order which denied the application with no explanation. Appendix A, at 1a.

5. Judge Felter Forthwith Enters a Default Judgment

While these matters were pending in the New Mexico Supreme Court, the trial proceeded before Judge Felter. As described in GAC's companion Petition for Writ of Mandamus, No. 77-1237, p. 8, Judge Felter had begun the trial on October 31, 1977, and had continued it from day to day notwithstanding this Court's decision of October 31, 1977, reversing his order prohibiting federal arbitration and federal judicial proceedings. By the end of February, plaintiff United Nuclear Corp. ("UNC") had presented seven of its eight witnesses and was within about two weeks of concluding its case-in-chief.

Judge Felter's "discovery order" of November 18 had directed UNC to serve upon GAC and file with the court proposed findings of fact to be entered because of GAC's inability to secure, produce or identify Canadian documents in the possession of a non-party Canadian corporation, Gulf Minerals Canada, Limited ("GMCL"), a sub-

⁴ Any different interpretation of the order of the New Mexico Supreme Court would render that Court's order meaningless, for that Court had already denied a Petition for Prohibition sought before Judge Felter's findings were known, and therefore the only meaningful interpretation of the State Supreme Court's order was that there should be review of Judge Felter's order after the findings were made available to counsel.

sidiary of Gulf Oil Corporation ("Gulf"), which is one of the constituent partners of GAC. On December 19, 1977, UNC filed four pages of proposed findings and a supporting memorandum of 214 pages. This document was returned *sua sponte*⁵ by Judge Felter on January 25, 1978 (Appendix E, at 34a), and both parties were told to submit, simultaneously, proposed findings and briefs by a date later set at February 15. On the day following this simultaneous submission, Judge Felter issued the previously discussed order which announced that he would act on or after March 1 without advance disclosure of any proposed findings.

On February 9 and 10, Indiana & Michigan Electric Company ("I&M") and UNC filed motions respectively seeking dispositive evidentiary sanctions and a default judgment. I&M joined in the motion for a default judgment on February 13. These motions raised for the first time allegations of general bad faith in furnishing information regarding the international marketing arrangement. GAC therefore requested on February 13 that an evidentiary hearing be held at which it could prove its good faith. This motion was vigorously opposed by UNC and I&M, and ultimately was denied by Judge Felter as part of his order of March 2.

On February 15, UNC and I&M filed briefs containing over 150 pages dealing with these charges of general bad faith. GAC's response to these 150 pages was due on February 27, and on February 21 Judge Felter denied GAC's request for an extension of time to file its response to UNC's and I&M's grave charges. GAC did file its response briefs in a timely fashion on February 27 and 28.

On the morning of March 2, 1978, Judge Felter adjourned court for the day at approximately 11:00 a.m.,

⁵ No advance warning was given to GAC, whose attorneys had been doing extensive work for over a month preparing a response to the initial submission.

without giving any warning that entry of a default judgment was imminent. Approximately three hours thereafter—about one-half hour after the New Mexico Supreme Court acted—he issued a 22-page “Sanctions Order and Default Judgment” (Appendix B, at 2a), which sweepingly condemned GAC’s conduct during discovery and entered a “judgment by default” on the issue of liability in favor of UNC and I&M. Notwithstanding the default nature of the judgment, the Order also announced, purportedly pursuant to Rule 37 of the New Mexico Rules of Civil Procedure (Appendix S at 90a), twelve findings of fact and law relating to an alleged “international conspiracy and cartel of uranium producers” between 1972 and 1975.*

The concluding paragraphs of the Sanctions Order and Default Judgment declared that trial of the case is to continue “upon determination of damages only, and such other matters as may now be appropriate in view of the granting of default judgments herein”. (Appendix B at 21a).

6. The “Recitals” in Judge Felter’s Order

As we have indicated, no opportunity was provided to GAC to deal with any of the allegations of bad faith in an evidentiary hearing. Judge Felter’s “Recitals” and “Findings” were, in fact, mainly adoptions *in haec verba* of UNC’s proposals and were completely unjustified on the record before him. A brief review of part of the history of the litigation relevant to the discovery issues is set out in Appendix F, at 36a. This review demonstrates how patently erroneous and unfair are the findings that the lack of production of documents in the possession of Gulf or GMCL constituted bad faith.

* GAC is not a uranium producer. Indeed, uranium mining and milling are expressly excluded from the scope of GAC’s activities.

Although Judge Felter's Sanctions Order and Default Judgment contains a number of "Recitals" of general bad faith in the two-year course of discovery in the lawsuit, the "Recitals" are permeated with the same jurisdictionally impermissible actions that rendered the November 18, 1977 order fatally defective. Recital 46, for example, expressly readopts the findings in the November 18 order—attaching and incorporating it by reference—and thus carries forward all of the unconstitutional excesses of that earlier order, including the holding that "[d]eference to the sovereignty and national interest of Canada . . . cannot be accomplished through sacrifice of the sovereignty of New Mexico. . . ." (Appendix B at 23a). Additionally, the Sanctions Order and Default Judgment amplifies the November 18 order's intrusion into foreign affairs and its violation of the "act of state" doctrine by (1) construing the Canadian Regulations to permit identification of documents, notwithstanding communications from the Canadian Government to the contrary (Recital 29; Appendix B at 13a); (2) suggesting that GAC, a mere private party, not a government, should have undertaken "diligent and long-term negotiations" with the Canadian Government (Recitals 32-35; Appendix B at 13a-15a); and (3) adopting twelve substantive findings expressly adjudicating the legality and propriety, under New Mexico law, of the international marketing arrangement. (Appendix B at 17a-21a).

With reference to the question of the Canadian Government's position concerning the disclosure of information or documents located in Canada, Judge Felter dismissed, apparently as too late (Recital 32; Appendix B at 13a-14a), GAC's request of February 22, 1978 that he and all parties attend a meeting in Ottawa to discuss the availability of the Canadian documents with the appropriate Canadian authorities. Although both the judge and UNC refused to attend, such a meeting was held on March 3, 1978. A summary of

the meeting is reproduced in the accompanying Appendix G at 40a. Canadian officials made it clear at that meeting that production or identification of the documents by any direct or indirect means was a crime under Canadian law, which could not be circumvented, and that the Canadian Government viewed the entire matter as a difference among governments to be discussed and resolved totally on a governmental level.⁷ Moreover, the Canadian authorities expressed surprise that it could be suggested that documents had been deliberately withheld by being stored in Canada. In their view, the risk was greater that there had been excessive disclosure in violation of Canadian policy via GMCL's contacts with its parent, Gulf.

7. The "Findings" in Judge Felter's Order

The twelve paragraphs of findings of fact and law, which Judge Felter included in his order because of GAC's assertedly "willful and deliberate" failure to comply with discovery rules, concern exclusively the "international conspiracy and cartel of uranium producers." Several of the "Findings" related not to GAC, but to Gulf, which had been deliberately dropped as a party defendant by UNC in order to avoid removal to federal court. See Appendix F at 36a. Thus, as just one example of a finding relating to Gulf, purportedly because there was a void in the evidentiary record pertaining to "the international conspiracy and cartel," Judge Felter entered a judicial finding that:

. . . Gulf refused to supply uranium to GUNF as it had led UNC and GUNF to believe it would do and refused to allow GUNF to purchase uranium on

⁷ The Canadian officials pointed out that government to government discussions were occurring between the United States and Canada, but that these discussions did not contemplate the transmission of the documents held by private companies to the United States.

the open market, thereby breaching any fiduciary duty it may have owed to UNC. (Appendix B at 20a-21a).⁸

GAC was specifically named by Judge Felter as a co-conspirator in the formation of the "international conspiracy and cartel," and by this unsupported finding—again based on the absence of evidence—all alleged wrongs committed by the "cartel" were laid at GAC's door.

8. The Effect of Judge Felter's Order

The press coverage of the trial in the New Mexico courts has been intense, and Judge Felter's order received great attention in *The New York Times*, *The Wall Street Journal*, and *The Washington Post*. See Appendix H at 57a. On March 6, 1978, UNC took out triumphant full-page advertisements in *The Wall Street Journal* and *The New York Times*, setting forth figures indicating that the judge's ruling could augment UNC's revenues by approximately \$864 million. See Appendix I at 66a.

We previously have noted the impact of this ruling on other pending and possible litigation (see Petition for a Writ of Certiorari, No. 77-1236, pp. 17-18, n.12). The judicial finding—albeit by a state trial judge, in the context of a default judgment—that there is liability growing out of a large "international uranium cartel" is obviously an invitation to countless lawsuits and possible harassment, by litigation, of any entities named as "co-conspirators." Moreover, Judge Felter's hasty conclusion of the trial before him may substantially vitiate any effort by GAC to arbitrate against UNC, an effort which already has been precluded for two years by Judge Felter's

⁸ GUNF (Gulf United Nuclear Fuels Corporation) was a corporation owned by Gulf and UNC. Interestingly, this finding regarding GUNF is directly refuted by UNC's own witnesses, who said that Gulf contracted to sell 5.3 million pounds of uranium to GUNF and that GUNF did purchase uranium in the open market. Appendices M and N at 73a-74a).

initial illegal injunction and later illegal stay order barring federal arbitration proceedings. *See* Petition in No. 77-1237.

REASONS FOR GRANTING THE WRIT

Judge Felter's decision of March 2, 1978 contains many erroneous and unjustified findings of fact and law. But this Petition for a Writ of Certiorari does not seek review of those errors which will first have to be reviewed, upon a careful consideration of the full record, in the New Mexico appellate courts. Thus the discussion of some of the facts of this case in Appendix F at 36a, is designed only to demonstrate that the picture painted by Judge Felter in his extraordinarily intemperate and injudicious ruling should not be given the faith and credit ordinarily assigned to the rulings of a trial judge.

Rather than bringing Judge Felter's entire array of errors here, this Petition focuses only on a limited but critical aspect of the proceedings below. Specifically, by permitting Judge Felter to terminate the case in mid-trial on grounds pertaining principally to GAC's inability to obtain identification, production or disclosure of Canadian documents or information in the possession of GMCL, and by permitting Judge Felter to enter a default judgment without prior disclosure of his proposed findings of fact and law, the New Mexico Supreme Court aggravated the constitutional violations discussed in GAC's pending Petitions in No. 77-1236 and No. 77-1237.

1. The New Mexico Supreme Court's ruling which permitted Judge Felter to proceed as he did, together with the order Judge Felter issued one half hour later, bring to fruition Judge Felter's repudiation of this Court's decision of October 31, 1977—a repudiation which is the subject of GAC's Petition for Mandamus. Having blocked GAC from access to federal courts and federal

arbitration tribunals for twenty months, having refused to defer proceedings in his court while federal remedies might be sought after this Court's remand, and having again stayed GAC from proceeding with federal arbitration, Judge Felter has now rushed to enter a judgment that, if not set aside, renders moot any potential federal arbitration or federal judicial proceedings against UNC and thereby circumvents this Court's ruling. If Judge Felter had taken the only course proper upon the issuance of this Court's decision—*i.e.*, stayed proceedings in his court until there was an opportunity to raise in federal arbitration proceedings and in federal courts the questions which GAC should have been permitted to raise there twenty months earlier—all issues properly cognizable in federal arbitration or judicial proceedings might have been presented to such federal forums. These would even have included the issues relating to the "international uranium cartel," which might thereby have been presented to the more appropriate forum of a federal court in a case in which all interested parties would have been represented.* But instead of taking the proper course, Judge Felter has seized the opportunity, growing out of his own unjustified orders requiring Canadian documents and Canadian information, to enter against GAC the most damaging order he could. The New Mexico Supreme Court should not have permitted him to do so, and his order entered pursuant to the State Supreme Court's authorization should be overturned so that federal arbitration and federal judicial remedies can be effectively pursued.

* The twelve paragraphs of findings in Judge Felter's decision of March 2 rest upon findings that are, to the best of our knowledge, unprecedented in the records of state court litigation: Judge Felter has found that foreign nations and private business entities have engaged in concerted international conduct giving rise to immense civil liabilities. Such a finding concerning international events should be within the exclusive jurisdiction of federal courts and should be made only on affirmative proof, and not on the absence of evidence, which was Judge Felter's basis for decision.

2. The March 2 order aggravates Judge Felter's infringement upon the exclusive powers over foreign affairs vested by the Constitution in the federal government and his violation of the "act of state" doctrine. By requiring disclosure of Canadian information and documents even though compliance would violate the criminal law of Canada,¹⁰ by declaring illegal a marketing arrangement adopted and enforced on Canadian soil by the Canadian Government, and by doing these things over the official protests of the Canadian Government expressing its sovereign national and international policies, Judge Felter transgressed a long line of decisions placing full power over foreign affairs in the federal government and recognizing that courts should not adjudicate the legality of the acts of a foreign nation on its own territory.

3. The March 2 order brings to complete fruition the violation of the Due Process Clause inherent in Judge Felter's order of November 18, and crystallizes the conflict between his November 18 ruling and this Court's decision in *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), and the decision of the Tenth Circuit in *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977).

When GAC prepared its Petition for a Writ of Certiorari in No. 77-1236, the precise extent of the sanctions which Judge Felter would impose for nonproduction of GMCL's Canadian documents was unknown. To that extent it might have been argued to be premature to assert that the principle of *Societe Internationale v. Rogers, supra*, had been violated. But the authorization

¹⁰ See Atomic Energy Control Act of Canada, Can. Rev. Stat., ch. A-19 (1970), Appendix O, at 76a; Canadian Uranium Information Security Regulations, Stat. O. & R. 76-644 (P.C. 1976-2368), Appendix P, at 68a; Ontario Business Records Protection Act, Ont. Rev. Stat., ch. 54, §§ 1-3 (1950), Appendix Q, at 87a. October 25, 1977 letter from Office of Ontario Deputy Attorney General to Canadian counsel, Appendix R, at 89a.

given to Judge Felter by the New Mexico Supreme Court, and Judge Felter's termination of the liability aspects of the trial by default judgment—both occurring on March 2—have ripened GAC's argument beyond any contention of prematurity. It is plain now that Judge Felter is imposing the ultimate sanction—a default judgment—and is adding to it findings of fact that will seriously harm GAC and at least one of its constituent partners in other forums. This remedy conflicts with the *Societe Internationale* decision as well as with the Tenth Circuit's ruling in *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977). This Court said in the *Societe Internationale* case that there are constitutional limitations on the power of courts "to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." 357 U.S. at 209. Judge Felter provided no such opportunity. Instead he entered a default judgment in a case involving approximately 700 million dollars without even giving GAC a hearing to establish the good faith of its efforts to comply with the discovery rules, much less the kind of hearing on the merits contemplated by *Societe*. The very least the Due Process Clause requires is the kind of procedure initially contemplated by the New Mexico Supreme Court, i.e., a disclosure of the proposed sanctions and a hearing, with appellate review before the sanctions are entered.

4. This Court has jurisdiction to review the order we are now bringing before it. The decision of the New Mexico Supreme Court on GAC's application for mandamus and prohibition is, of course, reviewable under 28 U.S.C § 1257(3). See the discussion at pp. 16-17 of GAC's companion Petition for a Writ of Certiorari, No. 77-1236. Judge Felter's subsequent ruling is ancillary to the State Supreme Court's decision and can therefore be reviewed, on the broad constitutional grounds we have asserted, without compelling GAC to request again from the New Mexico Supreme Court the same relief which

that Court has already denied twice—once when it refused a writ of prohibition on January 11, 1978, and again when it refused such a writ on March 2, 1978.

Alternatively, in the unusual circumstances of this case, a common-law writ of certiorari, under 28 U.S.C. § 1651, directly to the trial court would be appropriate. *United States Alkali Export Ass'n v. United States*, 325 U.S. 196, 201-204 (1945). Compare, e.g., *Ex Parte Collett*, 335 U.S. 897 (1948); *Kilpatrick v. Texas & So. Pac. Ry.*, 335 U.S. 897 (1948); *Ex Parte Collett*, 337 U.S. 55 (1949); *Kilpatrick v. Texas & So. Pac. Ry.*, 337 U.S. 75 (1949).

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

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